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IN THE

Supreme Court of the United States

October Term, 1962

No. 719

BORIS S. NADIAK,

Petitioner,

vs.

CIVIL AERONAUTICS BOARD and NAJEEB E. HALABY, Administrator of the Federal Aviation Agency,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in the above-entitled case on July 6, 1962.

CITATIONS TO OPINIONS BELOW

The findings of the hearing examiner of the Civil Aeronautics Board, dated February 24, 1961, may be found in the record on appeal, pp. 142-237. The opinion and order of the Civil Aeronautics Board, dated March

24, 1961, may be found in the record at pp. 118-138 and is presented in Appendix B hereto. The opinion of the United States Court of Appeals for the Fifth Circuit, printed in Appendix A hereto, is reported in 305 F.2d 588.

JURISDICTION

The judgment of the Court of Appeals was entered on July 6, 1962 (R. 1298). Rehearing was denied on August 8, 1962. On November 2, 1962, this Court granted an extension of time to file this petition to and including January 4, 1963. The jurisdiction of this Court is invoker under 28 USC § 1254 (1) and 49 USC § 1486(f).

QUESTIONS PRESENTED

(1) Whether the Federal Aviation Administrator had jurisdiction under proper construction of the Federal Aviation Act of 1958 to invoke the emergency powers granted him by Congress to revoke all the licenses of a commercial airline pilot, where the "emergency" involved was 23 alleged offenses spanning 10 years, the most recent of which occurred eight months prior to the emergency order, and of which the Administrator had knowledge for more than six months prior to the emergency order; or in the alternative,

(2) Whether the use of emergency powers by the Federal Aviation Administrator in an emergency order charging a commercial airline pilot with 23 acts of misconduct spanning 10 years, the most recent of which occurred eight months prior to the emergency order, violated petitioner's right to procedural due process under the Fifth Amendment to the United States Constitution.

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

The Constitutional provision involved is the due process clause of the Fifth Amendment to the United States Constitution:

> "No person shall * * * * be deprived of life, liberty, or property, without due process of law; * * * * *."

The statutory provision involved is § 609, Federal Aviation Act of 1958, 49 USC § 1429, which provides as follows:

> Reinspection or Reexamination; Amendment, Suspension, or Revocation of Certificates; Notification; Hearing; Appeal to Board; Judicial Review.
>
> "Sec. 609. The Administrator may, from time to time, reinspect any civil aircraft, aircraft, engine, propeller, appliance, air navigation facility, or air agency, or may reexamine any civil airman. If, as a result of any such reinspection or reexamination, or if, as a result of any other investigation made by the Administrator, he determines that safety in air commerce or air transportation and the public interest requires, the Administrator may issue an order amending, modifying, suspending, or revoking, in whole or in part, any type certificate, production certificate, airworthiness certificate, airman certificate, air carrier operating certificate, air navigation facility certificate, or air agency

certificate. Prior to amending, modifying, suspending, or revoking any of the foregoing certificates, the Administrator shall advise the holder thereof as to any charges or other reasons relied upon by the Administrator for his proposed action and, except in cases of emergency, shall provide the holder of such a certificate an opportunity to answer any charges and be heard as to why such certificate should not be amended, modified, suspended, or revoked. Any person whose certificate is affected by such an order of the Administrator under this section may appeal the Administrator's order to the Board and the Board may, after notice and hearing, amend, modify, or reverse the Administrator's order if it finds that safety in air commerce or air transportation and the public interest do not require affirmation of the Administrator's order. In the conduct of its hearings the Board shall not be bound by findings of fact of the Administrator. The filing of an appeal with the Board shall stay the effectiveness of the Administrator's order unless the Administrator advises the Board that an emergency exists and safety in air commerce or air transportation requires the immediate effectiveness of his order, in which event the order shall remain effective and the Board shall finally dispose of the appeal within sixty days after being so advised by the Administrator. The person substantially affected by the Board's order may obtain judicial review of said order under the provisions of section 1006, and the Administrator shall be made a party to such proceedings."

STATEMENT

Petitioner is a commercial airline pilot who has flown for more than 20 years and has flown in scheduled air transportation for more than 12 years (R. 869). He has flown nearly 15,000 hours without accident or injury to passengers or equipment (R. 870). He holds almost every rating granted by the Federal Aviation Agency (R. 869). He has never failed a flight check nor received an unsatisfactory grade (R. 871).

On July 22, 1960, the Federal Aviation Administrator proposed to suspend one of the licenses of the petitioner, and to issue in its place a temporary license. This proposed minor disciplinary action was because of a reported incident on March 15, 1960 of petitioner's having flown too close to another aircraft. Petitioner resisted this proposed discipline and the Administrator took no further action to impose the suspension. But the Federal Aviation Administrator then commenced a full-scale investigation of petitioner, which took more than eight months to complete (R. 276).

On January 12, 1961, the Federal Aviation Administrator, General E. R. Quesada, acting under the emergency provisions of § 609, Federal Aviation Act of 1958, 49 USC § 1429, revoked all of the licenses of the petitioner (R. 13-22). The order charged the petitioner with 23 offenses. The most recent of these offenses was alleged to have occurred on May 8, 1960, over eight months prior to the emergency order. The remaining 22 charges covered a period back to 1951, with five of the charges relating to "an unknown date" (R. 19, 20, 21). Petitioner appealed this order to the Civil Aeronautics Board and

on January 27, 1961, the Federal Aviation Administrator filed a complaint alleging the same 23 offenses against petitioner (R. 1-12). On January 24, 1961, the Administrator notified the Civil Aeronautics Board of the emergency character of his order, thereby putting into effect the sixty-day time limit on action by the Civil Aeronautics Board imposed by § 609 of the Federal Aviation Act of 1958 (R. 22). This required the Civil Aeronautics Board to hold the trial and complete the appeal within 60 days. A hearing was immediately ordered before a hearing examiner of the Civil Aeronautics Board, which hearing commenced February 13, 1961 and was completed on February 24, 1961 (R. 251-1189). At the commencement of the hearing, petitioner moved to dismiss the charges (R. 265) on the ground, among others, that there was no showing that an emergency existed, which motion was denied (R. 271). The hearing examiner found that substantially all of the charges were proved and recommended that the order of revocation of all licenses of petitioner be affirmed (R. 1189).

On March 24, 1961, the Civil Aeronautics Board, disregarding 18 of the charges against petitioner and characterizing many of them as "trivial" and "ambiguous as to date" (R. 134), found five of the charges to be substantial and proven (R. 118-138). The Board, nonetheless, affirmed the order of the Administrator revoking all of petitioner's licenses (R. 138). The petitioner then appealed to the United States Court of Appeals for the Fifth Circuit. The Court of Appeals, while highly critical of "the blunderbuss nature of the charges" and the "sandbagging a pilot with a whole mass of old, trivial, petty or insubstantial charges" (305 F.2d at 591), upheld the orders of the Federal Aviation Administrator and the Civil

Aeronautics Board as not violating the fundamental rights of petitioner.

Jurisdiction of the Civil Aeronautics Board was founded upon 49 USC § 1429, and jurisdiction of the United States Court of Appeals for the Fifth Circuit rested upon 49 USC § 1486.

The Questions here presented were raised by Petitioner before the Trial Examiner of the CAB below (R. 265, 271); to the CAB (R. 91); and were argued and considered by the Court of Appeals below as shown by its opinion in Appendix A; and in the Petition for Rehearing to the Court of Appeals (R. 1299-1301).

REASONS FOR GRANTING THE WRIT

Congress has granted vast and awesome emergency powers to the Federal Aviation Administrator for use in emergency to protect the safety of the American public. At best, the use of these emergency powers works a substantial hardship upon any person against whose interest these emergency powers are invoked. Upon the invocation of the emergency powers, a complete trial and appeal must be held and concluded within sixty days. In the instant case the Federal Aviation Administrator used these powers when there was no emergency, and in a manner never intended by Congress, and in such a way as to assure that the petitioner could not adequately defend himself against the charges made.

Normal Procedures vs. Emergency Procedures

Normally, when the Federal Aviation Administrator desires to suspend or revoke licenses of an airline pilot,

the pilot is informed of the proposed action and has an opportunity to present evidence to the Administrator and then to appeal to the Civil Aeronautics Board which must grant him an opportunity again to present evidence as well as arguments and written briefs. Under the normal procedure there is no time limit other than that generally provided in the Administrative Procedure Act which simply provides that, "In fixing the times and places for hearings, due regard shall be had for the convenience and necessity of the parties or their representatives" [USC, Title 5, § 1004(a)(3)].

The Rules of the Civil Aeronautics Board provide for defensive pleadings including motions to dismiss [CFR, Title 14, § 301.18], and motions for more definite statement [CFR, Title 14, § 301.19]. They provide a flexible time for the commencement of hearings depending in part upon the convenience of the parties [CFR Title 14, § 301.30]. Extensions of time may be granted for good cause [CFR Title 14, § 301.13(d)]. The time restrictions on pleadings [CFR Title 14, § 301.13] and on appellate procedures [CFR Title 14, § 301.45, 301.46] are similar to the time limitations of civil actions in the Federal courts.

However, when the emergency powers provided by § 609 of the Federal Aviation Act of 1958 are invoked by the Administrator, not only is the pilot grounded pending the hearing and review by the Civil Aeronautics Board, but from the date that the Administrator notifies the Board of the emergency character of the order, the Board has only 60 days in which to permit pleadings, to hold the hearing, to take testimony, to make initial findings and conclusions, to permit preparation of written briefs, to grant oral argument, and to dispose of the matter.

The statute and the CAB rules thereunder, make the time limitations under the emergency procedures completely inflexible. There is allowed but eight days to plead and then but eight days to prepare for trial [CFR, Title 14, § 301.50]. The appellate time limitations are similarly restricted. No extensions of time are permissible as the Board has a Congressional mandate to complete the trial and appellate procedures within 60 days.

It seems clear when the emergency procedures are contrasted with the normal procedures, that Congress intended that the emergency procedures should be invoked immediately upon a serious and patent threat to air safety. Congress clearly did not intend that a pilot should be required to defend his whole professional career on short notice under the severe restrictions of the emergency procedures.

This "Emergency"

The thrust of the charges against the petitioner was that he lacked competent judgment. His high technical proficiency and ability were conceded. No accident or injury was charged. No mental or physical deficiency was alleged. Only his judgment was attacked, and even his judgment was not attacked on the basis of any recent incidents.

The most recent incident of alleged bad judgment occurred on May 8, 1960, more than eight months prior to the emergency order of January 12, 1961. The most serious alleged offense occurred on March 15, 1960, an incident involving a charge of flying too close to another aircraft. The Administrator admitted that he had knowledge of this

incident at least by April 25, 1960 (R. 276), and that he then commenced the investigation of petitioner from which the other alleged offenses were discovered. On the basis of this investigation, the Administrator proposed minor disciplinary action against the petitioner on July 22, 1960. *Thus, with full knowledge of the alleged substantial offenses against petitioner, the Administrator not only did not declare an emergency but proposed under normal procedures to impose only minor sanctions against petitioner.* When the petitioner indicated that he wished to oppose the July 22, 1960 minor discipline by the Administrator, the Administrator declined to proceed further and declined to hold hearings and took no further action. Consequently, he permitted the petitioner to fly as a commercial airline pilot for National Airlines, transporting thousands of passengers over thousands of miles for another six months. The Administrator clearly did not feel that any emergency existed in July 1960.

What motivated the Administrator some six months later to declare an "emergency" is not known.[1] No recent act was alleged against petitioner in the emergency order of January 12, 1961, but to the contrary, his conduct since May 8, 1960, or for more than eight months while under investigation and presumably under close observation was apparently correct in every instance.

There is absolutely nothing in the Administrator's emergency order, nor in the charges against petitioner, nor anywhere in the entire record to justify the emergency character of the proceedings. To the contrary, it affirmatively appears that the Administrator, with knowledge, and after three months of investigation, himself, in

[1]But see record pp. 871 and 872.

July, 1960, did not characterize the situation as an emergency and did not even follow through on proposed minor disciplinary action once begun.

The action of the Administrator in invoking the emergency powers granted him by Congress was nothing short of arbitrary, capricious and willful abuse of power.

The Contemplated Use of the Emergency Powers

When Congress established the 60-day time limit for both trial and appeal in an air safety emergency, it necessarily contemplated a recent and serious situation, but presumably it also had in mind the evidence that is available in the air industry, particularly that of automatic recording devices and other scientific equipment whose authenticity is not subject to the infirmities of human observation, recollection and interpretation.

The charges against petitioner in the instant case were based on oral testimony [R. 120], not on scientific recording devices or taped records of conversations. Compare **Specht vs. Civil Aeronautics Board,** 254 F.2d 905 (CA 8, 1958). On the contrary, when the petitioner sought to secure in his own defense the taped recordings of his conversations with control towers and other aircraft, he was informed that the Federal Aviation Agency itself had routinely destroyed the tapes in question [R. 1259]. Because of this very reason, the rules of the CAB characterize allegations of offenses more than six months old as "stale" (CFR, Title 14, § 301.18(c)). The petitioner, however, was required to defend himself against 23 "stale" charges allegedly committed at various times over the past decade and to have occurred at various places,

from Boston in the north, to Miami in the south, and as far west as New Orleans. This he had to do under the severe time limitations of the emergency provisions of § 609 of the Federal Aviation Act.

CAB Concern

The Administrator presumably conducted his investigation of petitioner from April 25, 1960 until January 12, 1961 with, of course, all the staff and facilities of his agency at his disposal, to say nothing of the power of that agency over the air industry. Upon the issuance of the January 12, 1961 order and the notification to the CAB of the "emergency," the Administrator required the petitioner in a matter of several weeks to defend himself against the Agency's months of investigation. It is not surprising, therefore, that the hearing examiner of the Civil Aeronautics Board found that 22 of the 23 charges were proved and that the greater amount of evidence was on the side of the Federal Aviation Agency.

The shotgun tactics used by the Administrator against the petitioner gave some concern to the Civil Aeronautics Board. The Board said in its opinion, "We fail to see what useful purpose is served in an emergency proceeding such as this by the inclusion of trivial and ill-defined charges, and such action can only serve to clutter the record with evidence directed toward establishing, refuting, or explaining them" (R. 134). In attempting to rationalize the impossible position in which petitioner was placed by the Administrator's use of the emergency provisions, the Board said, in its opinion, "It is true, of course, that the accelerated time periods required to meet the 60-day statutory period provided under the emergency provisions of

section 609 place an added burden on the respondent as well as all others concerned, particularly in a situation like the present where numerous violations are involved. This, however, is largely the unavoidable result of the statutory scheme which the Congress had deemed essential in furtherance of the overriding interest of air safety" (R. 133).

The petitioner's predicament in this case is clearly not the unavoidable result of the statutory scheme established by Congress, but is the result of the deliberately chosen course of action of the Administrator.

This case was to be won or lost before the hearing examiner. The Board, in its opinion, finds its function limited to deciding "whether the findings of the Examiner are supported by substantial, reliable or probative evidence" (R. 120). On the record made, the Board concluded, "Here the Examiner's findings are predicated in large measure on his acceptance of the testimony of the complainant's witnesses and his rejection of the conflicting testimony of respondent" (R. 120).

It is no assistance to the petitioner that the Board disregarded 18 of the charges against him. At the time for taking testimony he had to defend all 23 charges. Were he clairvoyant, he might have concentrated his efforts on the five charges the Board ultimately determined to be substantial and proved. However, it cannot be said that the remaining 18 charges were insignificant, for not only were several of the 18 similar to the five relied upon by the Board, but inasmuch as the petitioner's judgment, not his ability, was in question, presumably each of the charges was significant. That each and every charge was

significant was clearly the opinion not only of the Administrator but also of the hearing examiner who refused to dismiss even the most trivial charges and found all but one of the charges to have been proven.

Petitioner respectfully submits that it is too pat and superficial to deal with the shotgun tactics of the Administrator as a matter simply of "cluttering up the record" and then proceed to pick five of the 23 charges as the basis for an order depriving a man of his livelihood.

Concern of the Court of Appeals

The Court of Appeals likewise expressed concern. Its opinion upholding the result seems to turn on the doctrine of "harmless error." The court said in reference to the shotgun tactics of the Administrator, "We combed every page of this record to make sure that the decision was not infected with this practice." 305 F.2d at 591.

The logical deficiency of this statement is patent. The lack of an opportunity to prepare an adequate defense to a multiplicity of charges allegedly occurring over ten years and at places thousands of miles apart will not affirmatively appear in a record. Only if one were successful in his defense, or if the evidence against one were of a type not susceptible of contradiction or qualification, could the lack of adequate time to defend be "harmless error." Here the whole case rests upon the hearing examiner's and the Board's "acceptance of the testimony of the complainant's witnesses and . . . . rejection of the conflicting testimony of respondent." The deprivation of the fundamental rights of petitioner in this case is anything but harmless. The fact that a man fights to defend him-

self with the only means available, in this case his own testimony, does not mean that he has had the opportunity of a fair trial.

The Sanction

One final observation should be made. The sanction imposed against petitioner was the revocation of all of his licenses including even his student license. While technically the revocation is only for one year, the petitioner is required to begin at the bottom rung of the FAA license structure and again attempt to ascend to the various commercial ratings. So far, he has been refused permission even to apply for a student license, although the year has expired. Inasmuch as lack of competent judgment was the basis of the order revoking all his licenses, it is reasonable to assume that petitioner has little chance of resuming his livelihood as a commercial airline pilot in the future.

The significance of this observation is that the sanction imposed was effectively that of depriving petitioner of his livelihood as a commercial airline pilot and was the most severe sanction available. The CAB based its affirmance of the revocation of all licenses of petitioner on petitioner's "flagrant disregard" of rules of air safety. Even if the petitioner could not, in a fair hearing with adequate defense, completely exonerate himself of all the charges, the type of sanction imposed depends upon the quality of petitioner's responsibility for the offenses charged. Upon this issue an adequate defense would be of critical significance.

Novelty and Importance of Questions Involved

The question of the power of the Federal Aviation Administrator to invoke his emergency powers under § 609 of the Act when no "emergency" exists has not heretofore been considered by this Court or by any of the eleven United States courts of appeals. In view of the awesome nature of such power and the corresponding possibilities of abuse, the question is clearly one of national importance in the administration of the Act and should be settled by the considered review and decision of this Court. Especially is this so since the CAB has heretofore held under the predecessor Civil Aeronautics Act that it lacked authority to review the invocation of emergency powers by the Administrator. **Leonard J. Specht**, 25 C.A.B. 859, 892 (1957). The CAB is apparently persisting in this same view under the 1958 Act, despite its powers of review under § 609, as demonstrated by the instant case. Petitioner respectfully submits that Congress did not intend that the wrongful invocation of emergency powers when no emergency basis therefor exists and when such powers are used to deny due process should stand forever uncorrected by any agency or court. Compare **Korematsu v. United States** (1944), 323 U.S. 214, with **Ex parte Endo** (1944), 323 U.S. 283, and **Ex parte Milligan** (1866), 4 Wallace 2.

Conclusion

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted.

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APPENDIX A

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 19136

BORIS S. NADIAK,

Appellant,

versus

CIVIL AERONAUTICS BOARD and NAJEEB E. HALABY, Administrator of the Federal Aviation Agency,

Appellees.

Petition for Review of Orders of the Civil Aeronautics Board sitting at Washington, D. C.

(July 6, 1962)

Before TUTTLE, Chief Judge, and BROWN and BELL, Circuit Judges.

BROWN, Circuit Judge: This case presents the basic question of whether the proceedings relating to the grounding of a commercial airline pilot were procedurally correct. After a careful reading of every word of 1234 typewritten foolscap pages, plus 40-odd documentary exhibits, we are convinced that they were, and affirm the decision of the Civil Aeronautics Board (CAB).

There is no doubt regarding the technical proficiency of this pilot. He has flown for more than 20 years—almost 15,000 hours—and during that time he has never had an accident which damaged an aircraft or injured a passenger. He has held almost every possible certificate from the FAA, and has been employed in scheduled air transportation for over 12 years as the holder of an Airline Transport Pilot Certificate. He has never failed a flight check, nor even received an unsatisfactory grade. But his technical proficiency is not in issue here—nor was it below. The Administrator's emergency revocation of Nadiak's Airman Certificate was based on a lack of the necessary judgment and responsibility.

On July 22, 1960, the Administrator proposed to suspend Nadiak's Airline Transport Certificate for 60 days and to issue in its place a temporary Commercial Pilot Certificate. This proposed minor-wing-clipping was because of a reported incident on March 15, 1960, of his having flown too close to another aircraft in violation of certain Civil Aeronautics Regulations. His resistance to this order and his appeal to the Civil Aeronautics Board precipitated a full scale investigation, which took over 8 months to complete, covering several thousand miles and brought into review 12 years of Nadiak's professional career. The result was an emergency order on January 12, 1961, by the Administrator. This completely grounded Nadiak by revoking all of his certificates.[1] After a full

[1]This emergency order is authorized by §609 of the Federal Aviation Act of 1958, 49 USCA §1429. The effect of the Administrator's determination that an emergency exists is to give immediate effectiveness to his order. Because of the peremptory nature of such an order, an immediate appeal to the CAB by the aggrieved person is permitted. The appeal must be finally disposed of by that Board within 60 days. The order in this case provided that Nadiak could make applica-

hearing by an Examiner, the CAB affirmed the Administrator's action, and the present Petition for Review followed.

We feel it important to state at the outset that while we affirm the order in this case, we join with the CAB in registering our disapproval of one aspect of the practice followed in this proceeding. While we conclude without any reservation whatsoever that no prejudicial harm to Nadiak occurred as a result of it, the blunderbuss nature of the charges is the sole thing which gave us any real concern. We combed every page of this record to make sure that the decision was not infected by this practice. Considering the awesome nature of the Administrator's power when invoked in an emergency proceeding, we think that the FAA should be more selective than it was here in the specification of charges. What we have particular reference to is the bringing of some 23 charges, many of which are vague and trivial, in a proceeding of this nature when time for investigation and preparation of defenses is necessarily limited by the statutory timetable. For example, one of the charges brought three years later in 1961 stated that "On or about April 18, 1958, [Nadiak] * * * reported for duty * * * two minutes prior to scheduled departure time * * * ." Another charged him with "carrying a case of beer under his arm * * * on several occasions in 1956

tion for another Pilot Certificate after one year from the date of the order. As the one-year period has now elapsed, there is every reason to assume that the Administrator will fully comply with its obligation to afford proper and fair consideration to any such application by Nadiak. Nothing we say or imply is to be construed as an opposition to such post-suspension relief. Indeed, since it is public safety, and not punishment, which undergirds the whole statutory scheme and the disciplinary proceeding, restoration of certification, complete or partial, is a legitimate concern in the exercise of the expert judgment of the Administrator.

* * * ." Still another, presumably relating to his qualification to hold an Airman's Certificate, stated that "On or about May 23, 1956, [Nadiak] * * * pushed [a power mower] across the ramp at Miami, Florida."

While we fully appreciate the zealousness of the Administrator in carrying out his assigned responsibilities of promoting safety in the air lanes and the practical problems in doing so within limited time schedules, fundamental notions of fair play dictate that one called upon to defend truly serious charges in an emergency proceeding ought not to have adjudication of such substantial matters exposed to the possibility of inflammatory contamination by stale or trivial incidents. We find ourselves in full agreement with the CAB when, after ruling on the five and only major charges, it made a "general observation concerning the nature of the remaining charges in the Administrator's complaint, none of which, * * * are pertinent to our disposition of this proceeding." Thus, continued the CAB, "Our examination of them indicates that many appear trivial and some are ambiguous as to the date upon which the incident is alleged to have taken place. We fail to see what useful purpose is served in an emergency proceeding such as this by the inclusion of trivial and ill-defined charges, and such action can only serve to clutter the record with evidence directed toward establishing, refuting, or explaining them."

To this we would only add the caveat that avoidance of the practice is more than a janitorial necessity to prevent cluttering up a record. Sandbagging a pilot with a whole mass of old, trivial, petty or insubstantial charges may adversely affect fundamental rights. Serious charges are to be seriously tried as serious charges. The CAB, in

its role of the tribunal adjudicating charges filed by the Administrator, must, as would a Court in relation to the prosecution, see that charges fairly meet the demands of our fundamental concepts of a fair trial.

Without translating it specifically into any particular claim of error by CAB, Nadiak stresses that he was one of the few remaining "scab" pilots at National Airlines, and that almost all evidence against him was presented by Union members. Even though many witnesses testified that he was an "unpopular" pilot, no evidence was admitted which would require a reversal on this ground. At one time there were approximately 100 nonunion pilots employed by National. Many of these, including Nadiak, incurred the wrath of the Union pilots by flying during the strike against National in 1948. Since that time, their number has dwindled to less than 20. But with these facts standing alone, we are unable to perceive just what Nadiak's counsel would have us do. With proper enthusiasm he sought to impeach adverse witnesses by showing a conscious effort by the Union and its members to "first ground [Nadiak] and then drive [him] from the air lanes altogether," *Flight Engineers v. American Airlines, Inc.*, 5 Cir., 1962, — F.2d —, — [No. 19055, June 7, 1962]. But the CAB may well have thought this effort backfired. Typical of such testimony was the cross examination by Nadiak's counsel of one of the Union copilots.

> "Q. Were you aware of [Nadiak's] activities during the National strike about ten years ago?
>
> "A. I am aware that he is a non-ALPA member, a nonunion pilot, yes.
>
> "Q. Do you like that?

"A. The best way I can answer that question is either yea or nay for this reason, that during that winter period the majority of Captains flying out of the New York base were non-ALPA pilots, and I could show my flight log to show that 90% of the pilots I flew with were nonunion pilots. The fact that Captain Nadiak was nonunion had no bearing whatsoever."

Of this we can only say at this point that while credibility choices were available to the Examiner, they are not open to us. We must take the record as we find it. Whether, as the CAB found, the contention of Union-induced hostility toward Nadiak would merely "go to the question of motivation rather than to the factual accuracy of the testimony rendered," or would destroy altogether the credibility of the Union witnesses, was a matter confided to the trier of fact.

Turning now to the assigned errors, we find the usual one on review of administrative action—that the order is not supported by substantial evidence. But even reducing the matter to the only five major charges which the CAB sustained, the amount of evidence to support these is staggering. Admittedly, there was conflicting evidence on almost every charge, but our function is not to weigh the evidence to determine who should win the swearing match. The function of a reviewing Court is to accept the findings of fact made by the administrative body if there is substantial evidence in the record considered as a whole to support those findings. Federal Aviation Act, §1006(e), 49 USCA §1486(e); 5 USCA §1009(e); cf *NLRB v. Walton Manufacturing Co.*, 1962, U.S. , 82 S. Ct. ,7

L. Ed. 829; *NLRB v. Ferguson*, 5 Cir., 1958, 257 F.2d 88, 90; *Specht v. Civil Aeronautics Board*, 8 Cir., 1958, 254 F.2d 905, 913. Here there is ample evidence.

The next contention is that the sanction is too severe. Under the order the pilot was completely grounded. Nadiak's contention is that even accepting the entire mass of adverse evidence as true, it goes only to show that Nadiak is not qualified to be a pilot in command of an airplane carrying passengers. It does not, the argument continues, show that, for example, he would not be a qualified copilot, or pilot of a lesser rating. But with that, the Administrator, several experts, the Examiner, and the CAB as a matter of aeronautical expertness disagreed. Nadiak on abundant evidence was found to have (1) passed too close to another aircraft and violated regulations specifying procedure to follow in overtaking other airplanes, (2) violated an airport traffic pattern by turning right after a take-off and his company's safety rules by taking off with an excessive tail wind, (3) landed his aircraft at a time when the ceiling was below prescribed minimums, (4) deviated from flight clearances without obtaining amended clearances, and (5) violated other regulations by flying through and in close proximity to clouds while operating under VFR (Visual Flight Rules).

Though we do not have the benefit of the technical background of the two expert agencies charged with promoting safety in the air lanes, we know enough to see that the agency could properly regard these charges as quite serious. Such practices would endanger not only the aircraft piloted, along with its passengers, but other people, aircraft and property as well. More than that, what was

at issue was Nadiak's judgment and responsible use of it while in the air. The law is fortunately sensible enough to recognize that in a highly technical area the evaluation of action and appropriate disciplinary sanction necessarily requires that the agency be vested with a wide range of discretion in the imposition of penalties. *Walver v. CAB*, 2 Cir., 1958, 251 F.2d 954. Our review of the sanction imposed is confined to the inquiry of whether there was an abuse of discretion. We find no such abuse here. Cf. *Garber v. CAB*, 2 Cir., 1960, 276 F.2d 321; *Specht v. CAB*, 8 Cir., 1958, 254 F.2d 905; *Sisto v. CAB*, D.C. Cir., 1949, 179 F.2d 47; *Carey v. CAB*, 1 Cir., 1960, 275 F.2d 518, 522. And if this seems now or later to be too harsh, amelioration may be sought by Nadiak's making application for a certificate upon the expiration of one year from the date of the order. See note 1, supra.

The last group of assigned errors charged that the Examiner made numerous errors in his rulings during the course of the hearing. These are that the Examiner erroneously (1) failed to dismiss the complaint because the complete administrative file was not produced,[2] (2) did not require the production of certain tangible evidence, and (3) allowed Nadiak to be unduly prejudiced by the admission of hearsay evidence.

Taking these rulings in reverse order, we find no merit in the complaints about hearsay. Upon a careful review of the entire record, we find that most of the evidence admitted over objection was not subject to the hearsay exclusion anyway. In other words, under the traditional rules

[2]At oral argument, Nadiak's counsel stated that the case should turn on this point.

of evidence, the evidence was admissible. But if as to some of these isolated bits of evidence the traditional rules would have excluded the questioned evidence, its admission does not constitute error requiring reversal of this case because the technical rules of evidence that govern procedures in the courts are not necessarily applicable to administrative proceedings, Administrative Procedure Act, §7(c), 5 USCA §1006(c); *Falsone v. United States*, 5 Cir., 1953, 205 F.2d 734, 742, n. 14, cert. den. 346 U.S. 864, 74 S.Ct. 103, 98 L.Ed. 375; 1 Wigmore, Evidence §4c at 47-48. Furthermore, even if the evidence in question were excluded, there would still be substantial evidence to sustain the findings. *Sisto v. CAB*, D.C. Cir., 1949, 179 F.2d 47, 51. That would reduce it then to a question whether its erroneous admission infected the proceedings or critical fact findings. There is no basis for any such conclusion here.

The assigned error of not producing certain tangible evidence borders on the frivolous. Early in the proceedings, Nadiak filed an Application for Production of Documentary and Tangible Evidence. We find it unnecessary to rule on the duty of the agency to produce under such circumstances because the next day the FAA responded with a letter enclosing much of the requested data, telling how other parts of it could be obtained, and explaining that the remainder was not available as it had been routinely destroyed before the institution of the investigation into Nadiak's flight safety practices. In short the FAA produced all they had of the requested material. No more could be required.

Lastly—and from his viewpoint most important (see note 2, supra)—Nadiak asserts that the order should be

reversed because of the failure of the Administrator to produce his entire file before the Examiner and CAB. This, he says, is because the file "would add measurably to the evidence showing qualification." This rests upon his contention that proceedings before the CAB are appellate in nature and that their decision should be based upon the record as a whole. Reliance is placed on the fact that §609, 49 USCA §1429, provides for "an appeal" to the Board. How proceedings lasting over a week with a parade of witnesses being examined and cross examined can be called appellate in nature escapes us. Section 609 certainly does not sustain it. For that same section provides that the Board is not bound by the Administrator's findings of facts, and the Rules of Practice place the burden of proof upon the Administrator.[3]

But we do not quibble over nomenclature. As near as we can understand it,[4] the asserted error comes down to this. The Examiner and the Board should have received — and therefore read — the whole investigatory file of the Administrator. This, he claimed, would have revealed material that "would add measurably to the evidence showing [Nadiak's] qualification."

This was not sought for discovery. Nor was it a demand from time to time for a Jencks-like look at a particular witness' prior written statement. It was, rather, a broad contention that the whole file should somehow become a part of the record to give the Board and the "Examiner the opportunity to review those many findings of investigation * * * in favor of [Nadiak] * * *"

[3] 14 CFR §301.32(b).

[4] This point, and just what Nadiak's contentions were with respect to it, was the subject of painstaking inquiry on the oral argument. We have viewed it from every angle remotely suggested by him.

without which "the Examiner cannot make a fair determination * * *."

But this would destroy the whole structure so carefully designed by Congress to separate completely the inquisitorial functions from the adjudicatory function.[1] This would be to surrender the long and hard-fought gains of the Administrative Procedure Act. See especially §5(c), 7(d), 5 USCA §§1004(c), 1006(d). *Riss & Co., Inc. v. United States*, 1951, 341 U. S. 907, 71 S. Ct. 620, 95 L. Ed. 1345, reversing 96 F. Supp. 452; *Wong Yang Sung v. McGrath*, 1950, 339 U. S. 33, 70 S. Ct. 445, 94 L. Ed. 616. And since the public has a big stake in these proceedings, the Board was not required to acquiesce in the beguiling importunities that this undisclosed material coming from unspecified persons and acquired under unrevealed circumstances would somehow "help him." The Board was expected to pass on these serious charges by a proceeding which would in all vital respects give the Administrator and respondent a fair chance to meet and test evidence offered for and against the complaint. It is the considered judgment of Congress that the interest of neither the public nor the person under charge is adequately cared for if the adjudicatory tribunal is to have access to the ex parte partisan views of the investigatory-prosecutorial staff or to the material assembled by their efforts. *T.S.C. Motor Freight Lines, Inc. v. United States*, S.D. Tex., 1960, 186 F. Supp. 777, 790. The wish of a particular pilot that this fundamental principle be relaxed did not make the Board's rejection of it an error.

[1] This approach was specifically followed in the overhaul and marked changes in national air regulatory statutes. See Legislative History on Federal Aviation Act of 1958, expressly adopting the standards of the Administrative Procedure Act, 1958 U. S. Code Cong. & Adm. News, p. 3741, 3747-48.

The public — including judges who fly — has a vital interest in air safety. Responsibility for air safety has been placed in the administrative hands of those deemed by Congress to have an expert competence. Air safety was of primary importance in the adjudication of this case. The determination was that air safety would be promoted by the certificate revocation. After permissible credibility choices, the findings were that numerous regulations and rules of the air lanes — which must not be ignored or taken lightly — had been violated. Those findings were supported by substantial evidence in a hearing which was fair and regular. There it ends.

AFFIRMED.

APPENDIX B

Order No. S-1093

UNITED STATES OF AMERICA

CIVIL AERONAUTICS BOARD
WASHINGTON, D. C.

Adopted by the Civil Aeronautics Board
at its office in Washington, D. C.,
on the 24th day of March, 1961

NAJEEB E. HALABY,
Administrator, Federal Aviation Agency,

Complainant,

vs.

BORIS S. NADIAK,

Respondent.

Docket SE-177

OPINION AND ORDER

BY THE BOARD:

This proceeding is before the Board on appeal by respondent, Boris S. Nadiak, from the Initial Decision[1] of Examiner Joseph C. Caldwell, Jr., affirming the Ad-

[1]The Initial Decision was rendered orally at the conclusion of the hearing. A copy of the transcript is attached hereto.

ministrator's emergency order,[2] which revoked respondent's airman certificate and provided that he was ineligible to apply for another pilot certificate for one year. The Initial Decision is based on numerous findings of violations of the Civil Air Regulations, including careless and reckless operation endangering the lives and property of others. The Examiner concluded on the basis of the record that the respondent does not measure up to the standards required by public safety and public interest, in that respondent's conduct demonstrates that he does not possess the attributes of a pilot-in-command and that he lacks the qualification and fitness required of the holder of an airline transport pilot rating and certificate.

Respondent and the Administrator have filed briefs with the Board. Oral argument has been heard, and the case stands submitted for decision.

Respondent requests that the Examiner's order be reversed and the action dismissed. He contends that the Administrator has not adduced substantial, reliable, or probative evidence to prove his allegations. Moreover, respondent argues that the Administrator has produced little, if any, evidence going to the respondent's qualifications, and, indeed, that much of the Administrator's evidence, although proffered for other purposes, establishes that respondent has the qualifications relating to judgment, degree of care, and responsibility to hold his

[2]Pursuant to Section 609 of the Act, which provides in pertinent part as follows: "The filing of an appeal with the Board shall stay the effectiveness of the Administrator's order unless the Administrator advises the Board that an emergency exists and safety in air commerce or air transportation requires the immediate effectiveness of his order, in which event the order shall remain effective and the Board shall finally dispose of the appeal within sixty days after being so advised by the Administrator." By letter docketed on January 25, 1961, the Administrator advised the Board of the emergency character of his order.

airline transport rating. In any event, respondent argues that the Administrator's case would only warrant action against his airline transport pilot rating and would not require action against his remaining airman certificates and ratings. The Administrator urges that the Initial Decision be affirmed.

After consideration of the contentions of the parties in light of the record, we conclude that the appeal should be denied, and that the Administrator's order of revocation should be affirmed. The findings of the Examiner relating to the major charges in the complaint (paragraphs IV through VIII) are supported by substantial, reliable, and probative evidence.[1] In our view, the seriousness of these violations warrants the sanction imposed by the Administrator in his order, which was affirmed by the Examiner, irrespective of the validity of other allegations contained in the complaint. Accordingly, we find it unnecessary to pass on the respondent's contentions with respect to the remaining charges.

At the outset we wish to make clear the framework in which we are considering the issues in this proceeding and to comment upon certain general contentions which permeate respondent's defense. As provided in Section 301.47 of our Rules of Practice, we are concerned here with whether the findings of the Examiner are supported by substantial, reliable, or probative evidence. In any proceeding such as this, not infrequently conflicts in testimony will arise, and the Examiner of necessity will be called upon to resolve them. Because of the role the Examiner plays in the development of the record, the

[1] Except to the extent noted hereinafter with respect to the charges in paragraphs V and VI of the complaint.

Board, of course, must accord substantial weight to his conclusions on which of alternative or conflicting versions of the facts are worthy of belief.[4]

Here the Examiner's findings are predicated in large measure on his acceptance of the testimony of complainant's witnesses and his rejection of the conflicting testimony of respondent. Respondent appears to challenge this result because, in his view, (1) the Administrator's case depends primarily on the testimony of Air Line Pilots Association members, who he asserts were hostile to respondent; and (2) the fact that the Administrator took action against him at a time when he was involved in a labor dispute with National Airlines somehow contributed to this result. However, the Examiner specifically rejected these allegations, and respondent has shown nothing that would demonstrate error in Examiner's findings in this regard. Further, at best, respondent's contentions go to the question of motivation rather than to the factual accuracy of the testimony rendered. All of these matters were argued fully before the Examiner, he heard the testimony of the witnesses, and he had the opportunity to observe their demeanor and manner of testifying. Based on our examination of the record, we are satisfied that there is no foundation for a conclusion that the Examiner acted incorrectly, in any respect material to this decision, in the judgments he reached on credibility.

1. **Paragraph IV of the Complaint**

With respect to the allegations of this paragraph, the Examiner found that on March 15, 1960, respondent,

[4] *Administrator v. Specht*, Order S-825, September 9, 1957, *aff'd sub nom. Specht v. Civil Aeronautics Board*, 254 F. 2d 905 (8th Cir. 19).

(1) while approaching the Patrick Henry Airport at Newport News, Virginia, operated a DC-6 which was overtaking a Piper PA-18, and did not pass on the right, in violation of Section 60.14 (d)[5] of the Civil Air Regulations;[6] and (2) operated the DC-6 aircraft in such close proximity to the PA-18 as to create a collision hazard, in violation of Section 60.15 of the C.A.R.[7] The Examiner found that respondent's operation was careless and reckless, endangering the life and property of others, in violation of Section 60.12 of the C.A.R.[8]

The respondent contends, **inter alia**, that the Examiner erred in failing to consider Section 60.14(e) of the C.A.R.[9] and, in this connection, that respondent's was the leading aircraft. However, the PA-18 was engaged in a touch-and-go landing, and under Section 60.14(e) clearly had the right-of-way in approaching the airport, since it was at a lower altitude. Respondent is also mistaken in his belief that the record does not show that respondent was informed that the PA-18 was on a touch-and-go landing.

[5]The transcript reads "Section 60.14(b)." However, the complaint was amended at the hearing to correct a typographical error, thus conforming to the order of revocation. (T. 401.)

[6]§60.14(d): "An aircraft that is being overtaken has the right-of-way, and the overtaking aircraft, whether climbing, descending, or in horizontal flight shall keep out of the way of the other aircraft by altering its course to the right, and no subsequent change in the relative positions of the two aircraft shall absolve the overtaking aircraft from this obligation until it is entirely past and clear; * * *"

[7]§60.15: "No person shall operate an aircraft in such proximity to other aircraft as to create a collision hazard. No person shall operate an aircraft in formation flight when passengers are carried for hire. No aircraft shall be operated in formation flight except by prearrangement between the pilots in command of such aircraft."

[8]§60.12: "No person shall operate an aircraft in a careless or reckless manner so as to endanger the life or property of others. * * *"

[9]§60.14(e): "Aircraft, while on the final approach to land, or while landing, have the right-of-way over other aircraft in flight or operating on the surface. When two or more aircraft are approaching an airport for the purpose of landing, the aircraft at the lower altitude has the right-of-way, but it shall not take advantage of this rule to cut in in front of another which is on final approach to land, or to overtake that aircraft. * * *"

On the contrary, this fact was brought out on the direct examination of respondent's witness Scherer, who was copilot of the DC-6.[10]

Moreover, while we have not had the Examiner's advantage of observing the demeanor of the respondent on the witness stand, the cold record before us does not reflect favorably on respondent's credibility with respect to the incident. He testified first "that the longest time that I was on base leg would have been under a minute," and in almost the same breath asserted that "[t]he base leg was of some minutes duration."[11] The witness also denied that he had complained about light aircraft being given preference over his on other occasions,[12] but a document executed in his own handwriting on March 24, 1960, complained of being held up several months before at Patrick Henry by "touch and go circle and bounce aircraft."[13] Finally, respondent testified that the tower operator apologized to him, saying he was sorry that the light plane apparently failed to observe a red light that he had directed at it.[14] All five of the complainant's witnesses denied either that a red light was given the PA-18 or that there was a radio communication about a red light, and even the copilot, who testified for respondent, does not remember any voice communications about the red light; nor did he at any time see a red light directed at the PA-18.[15]

In view of the state of the record on this allegation, it is clear that the Examiner's finding is well supported.

[10] T. 132.
[11] T. 708.
[12] T. 715.
[13] Complainant's Exh. 23.
[14] T. 638.
[15] T. 136.

2. Paragraph V of the Complaint

The Examiner found that on May 24, 1960, respondent, piloting a DC-6 from the Patrick Henry Airport (1) executed a right turn on takeoff from Runway 6, and thereby failed to comply with the traffic pattern prescribed for the airport, in violation of Section 60.18(c) of the C.A.R.;[16] and (2) departed downwind at a time when a 15 knot tail wind existed, in violation of the Company Flight Manual.[17] The Examiner found that by these actions respondent operated the aircraft in a careless and reckless manner, so as to endanger the life and property of others, in violation of Section 60.12.

Respondent contends that the Examiner's findings fail to consider the official weather report at Patrick Henry Airport at the time of the alleged downwind takeoff showing the wind to be 7 and 8 knots from the west. However, the record shows that respondent took off at approximately 1345 Eastern time while the official weather reports were for 1258 and 1355. The Examiner's finding has ample support since the record establishes that the local controller, based on personal observation of the wind instruments available to him, advised respondent immediately prior to his takeoff that the wind was west southwest at 15.[18]

[16] §60.18(c): "Aircraft operating from an airport shall conform to the traffic patterns prescribed for that airport;"

[17] Manual requirements are set forth in Sections 40.50 through 40.53 of the Civil Air Regulations.

[18] Although respondent does not raise the question, we will modify the Examiner's finding indicating that the respondent was advised three times that the wind was 15 knots. Thus, the record shows that the testimony of the local controller is that, when respondent was cleared to Runway 24, he was given the wind direction and velocity as west southwest at 8 to 10 knots; that when respondent requested Runway 6, the controller gave him the wind velocity as between 12 and 14 knots; and that within one minute of respondent's takeoff, the controller gave respondent the wind again as west southwest at 15 knots and cleared

Respondent also urges that the Examiner failed to consider exhibits which confirmed an agreement between appropriate authorities allowing right turns from Runway 6. But this agreement was not in effect at the time of the incident involved here, and, in any event, required a prior clearance from air traffic control for such action.

3. Paragraph VI of the Complaint

The Examiner found that on May 8, 1960, respondent, (1) operating a DC-6 aircraft landed at Logan International Airport, Boston, Mass., when the ceiling and visibility were below the prescribed minimums for landing, violating Section 40.406 of the C.A.R.;[19] and (2) on this occasion operated the DC-6 aircraft in wilfull disregard of company instructions regarding the ceiling and visibility landing minimums for said airport. The Examiner found that respondent thereby operated the aircraft in a reckless and careless manner so as to endanger the life and property of others, in violation of Section 60.12.

Respondent contends that the Examiner should not have accepted the copilot's testimony that the ceiling was below the prescribed minimum at the time of landing

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him for takeoff. The testimony therefore shows that respondent was advised of a 15 knot wind only once and the finding is modified accordingly. This modification however, does not affect the Examiner's ultimate finding. Indeed, the record shows that under Company Flight Manual provisions no downwind takeoff was allowed in a DC-6 when the tail wind exceeded 8.5 knots.

[19] §40.406(a): "Except as provided in paragraphs (c) and (d) of this section, irrespective of any clearance which may be obtained from air traffic control, no airplane shall take off or land under IFR when the ceiling or ground visibility reported by the U. S. Weather Bureau or by a source approved by the Weather Bureau is less than the minimum approved for the airport when used as a regular airport."

The Examiner's finding that the visibility was below the prescribed minimum was apparently inadvertent, since he recognized that the runway visual range was 2800 feet whereas the prescribed minimum with respect to visibility was 2600 feet (Appendix, p. 895).

inasmuch as, in accordance with Section 40.406(c) of the regulations,[20] respondent, as pilot-in-command, had found the weather conditions to be better than the prescribed minimums. Further, respondent asserts that his evaluation of the weather conditions is supported by the official weather observation at 1932, 17 minutes after he landed, showing weather above the prescribed minimums.

We find the respondent's contentions unpersuasive. Certainly the provisions of Section 40.406(c) do not mean that the FAA and the Board are bound to accept as final the respondent's subjective assessment of the weather conditions which in fact existed at the time he landed. The respondent's contentions in this regard are subject to inquiry, and it was for the Hearing Examiner to judge initially whether the respondent's or the copilot's version of the incident was correct. We find nothing unreasonable in the Examiner's giving greater weight to the testimony of the copilot.[21] The official weather report showed a ceiling of 100 feet at 1916, approximately the time of the landing, which supports the copilot's testimony that the aircraft broke out of the overcast at 120 feet. The fact that the ceiling was 200 feet (the prescribed mini-

[20] §40.406(c): "An instrument approach procedure may be executed when the weather report prepared by the U. S. Weather Bureau or by a source approved by the Weather Bureau indicates that the ceiling or visibility is less than approved minimum for landing, if the airport is served by ILS and PAR in operative condition and both are used by the pilot, and thereafter a landing may be made, if weather conditions equal to or better than the prescribed minimums are found to exist by the pilot in command upon reaching the authorized landing minimum altitude."

[21] Other evidence of record shows the copilot to be a more reliable witness. Thus, respondent testified that prior to departing from Baltimore a check of the weather in Boston showed that it "was then approaching limits, that it was within limits." (T. 648.) The copilot, on the other hand, testified that on arrival at Baltimore respondent and he checked the weather and the weather at Boston had been below minimums for several hours and still was. (T. 186.) The trip log and the official weather observations for East Boston (Respondent's Exh. E; Complainant's Exh. 3) confirm the copilot's testimony.

mum) at 1932, therefore, does not impair the Examiner's finding that respondent landed in weather below the prescribed minimum.

There is no question that respondent in landing at Boston with a reported ceiling of less than 200 feet violated an operations bulletin of National dated April 1, 1959.[22] Respondent's contention that he was in compliance with an operations memorandum of March 20, 1959,[23] is of no validity, since the later bulletin clearly modified and superseded this memorandum.[24]

4. Paragraph VII of the Complaint

The Examiner found that on April 25, 1960, respondent, in piloting a 1049H Constellation aircraft during climbout to V295 airway after departing Miami VFR, (1) operated the aircraft closer than 500 feet vertically under and 1000 feet over cloud formations, and therefore violated Section 60.30 of the C.A.R.;[25] (2) received an

[22]Complainant's Exh. 25. This bulletin provided, *inter alia*, "It should be noted that the R.V.R. minimums at Idlewild and Boston carry an additional restriction of a 200 foot ceiling; therefore, a *reported* ceiling of 200 feet or better must exist before a landing may be made on the R.V.R. runway at these airports even though the R.V.R. value is equal to or better than minimum." (Emphasis added.)

[23]Complainant's Exh. B. This earlier bulletin read, "When RVR is hereafter reported in feet, it will automatically indicate that ceiling height is not a part of legal requirements; that is, RVR alone is controling for landings on the runway concerned."

[24]We find it unnecessary to determine whether in addition to violating the Civil Air Regulations, respondent also disregarded company instructions in failing to terminate the flight at Providence. Respondent's action in landing at Boston when the ceiling was below the prescribed minimum supports the Examiner's finding of careless and reckless operation.

[25]§60.30(a)(1): "Aircraft shall not be flown VFR less than 500 feet vertically under, 1,000 feet vertically over, and 2,000 feet horizontally from any cloud formation except that, in the continental control area, aircraft shall not be flown VFR less than 1,000 feet vertically and one mile horizontally from any cloud formation. Aircraft shall not be flown VFR within a control zone beneath the ceiling when the ceiling is less than 1,000 feet."

IFR clearance from Air Traffic control to maintain 9000 feet, and then deviated from that clearance without first having obtained an amended clearance and that he therefore violated Section 60.21 of the F.A.R.;[2] and (3) later received an amended clearance to 11,000 feet but when a request for further amendment to 7000 feet was unanswered, proceeded on down to that level and then to 1100 feet and flew at that level for 20 or 30 minutes without an amended clearance. The Examiner found respondent's conduct to constitute careless and reckless operation endangering the life and property of others, in violation of Section 60.12.

Respondent asserts that the Examiner failed to consider the conflict in testimony between the Administrator's witness and the flight engineer, who testified on behalf of respondent. In addition, respondent alludes to certain exhibits which he contends were not considered by the Examiner.

We conclude that the Examiner's findings are supported by the evidence. The Examiner determined that the copilot, Cover, gave a more reliable version of the events of the flight than did the respondent. Although the testimony of the flight engineer, Bartish, does not corroborate Cover's testimony, neither does it confirm that of respondent. The flight engineer's testimony is

[2] §60.21: "When an air traffic clearance has been obtained under either VFR or IFR rules, the pilot in command of the aircraft shall not deviate from the provisions thereof unless an amended clearance is obtained. In case emergency authority is used to deviate from the provision of an air traffic clearance, the pilot in command shall notify air traffic control as soon as possible and, if necessary, obtain an amended clearance. However, nothing in this section shall prevent a pilot, operating on an IFR traffic clearance, from notifying air traffic control that he is canceling his IFR flight plan and proceeding under VFR: PROVIDED, That he is operating in VFR weather conditions when he takes such action."

of scant assistance because he was unable to remember much relating to the flight. Thus, he testified that while he knew that portions of the flight were under VFR conditions, he could not recall what portions of the flight were so operated, or whether parts of the flight were conducted under IFR clearances.[27] He was unable to testify if they operated under IFR conditions at any time during the flight, with one exception.[28] He did distinctly recall looking out in the vicinity of Atlantic City, that they were "kind of high" there, and weather conditions at that particular time were VFR.[29] This testimony does not conflict with Cover's that they were on ATC clearance at 11,000 feet to just south of Atlantic City, and at this point the weather started coming down and the plane descended to 7000 feet and then to 1100 feet.[30] Since Cover testified that weather conditions changed near Atlantic city, Bartish could easily have made his observation prior to the change and the testimony of both is reconcilable. And we find nothing in the documentary evidence to which respondent refers (the trip log, weather observations at Miami and West Palm Beach, Florida, and a Jepco Avigation Chart) which would justify overturning the Examiner's findings.

5. Paragraph VIII of the Complaint

The Examiner found that on April 4, 1958, the respondent, operating a Constellation on a VFR flight from New York to Miami, flew through and in close proximity to clouds without an IFR clearance, in violation of Section 60.30 of the C.A.R.; and that operation of the aircraft

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[27] T. 592.
[28] T. 611.
[29] T. 595.
[30] T. 472.

under these conditions constitutes careless and reckless operation of an aircraft endangering the life and property of others, in violation of Section 60.12.

Respondent contends that the testimony of the Administrator's witness, the copilot on the flight, was impeached by respondent's exhibits showing a clearance from the Norfolk Center and later a cancellation of the clearance, respondent's trip log which was prepared by the Administrator's witness, and the testimony of respondent's witness, the flight engineer.

It is our conclusion that the Examiner's findings are supported by substantial, reliable, and probative evidence. The Examiner determined that the testimony of respondent's copilot, Guminski, should be accepted in preference to that of respondent. The record would sustain placing little or no reliance upon the testimony of respondent's witness, Bartish, as supporting the testimony of the respondent. For example, Bartish testified on direct examination that he recalled no argument or conversation in the cockpit concerning flying under instrument conditions without such a clearance.[11] On cross-examination he contradicted this previous testimony by stating that he thought there was a discussion between Guminski and respondent as to the legality of respondent's being able to fly VFR on top and "a few words were said."[12] Nor does the fact that the respondent operated during a portion of the trip with an IFR clearance undermine the copilot's testimony that at times respondent operated under instrument conditions without an instrument clearance.

[11] T. 593, 597-8.
[12] T. 608.

6. Miscellaneous Contentions

In view of the foregoing findings of violation, no useful purpose would be served by proceeding to rule on the remaining charges since, based on the charges we have already found established, we are convinced that the Administrator's order of revocation should be affirmed. However, before discussing the question of sanction, we wish to comment on certain other contentions of the respondent.

The respondent takes the position that the proceedings before the Board on appeal from the Administrator's order are essentially appellate in nature, involving a determination, among other things, of whether the Administrator's order is supported by evidence. In this connection, respondent maintains that the Administrator had the duty of presenting all the evidence his investigation developed, whether favorable or unfavorable to the respondent, for the Board's consideration. Respondent contends that in view of the Administrator's failure to submit all the results of his investigation, the Examiner erred in denying respondent's motion to dismiss. He also complains generally of the size of the record developed and the expedition with which the proceeding was handled.

While Section 609 of the Act speaks of an "appeal" to the Board, it is clear that such proceedings are not appellate in the usual sense. On the contrary, they are full-scale, **de novo**, adversary hearings, a fact which is apparent from the language of Section 609[11] and the Board's

[11]Section 609 provides, in pertinent part, "In the conduct of its hearings the Board shall not be bound by findings of fact of the Administrator." See also H. Rept. 2360, p. 8; H. Rept. 2556, p. 89 (Conference Report); S. Rept. 1811; Cong. Rec., p. 11738.

Rules of Practice. Under the Rules, the Administrator has the burden of proving the allegations in his complaint.[14] Where, as here, the respondent has been fairly placed on notice of the violations charged, has had ample opportunity to answer them, and the facts have been found on the bases of the evidence submitted, in our view the requirements of the statute are satisfied. It is true, of course, that the accelerated time periods required to meet the 60-day statutory period provided under the emergency provisions of Section 609 place an added burden on the respondent as well as all others concerned, particularly in a situation like the present where numerous violations are involved. This, however, is largely the unavoidable result of the statutory scheme which the Congress has deemed essential in furtherance of the overriding interests of air safety. Nothing has been presented which would warrant us in concluding that respondent has not been accorded full protection of his procedural rights.

One final matter warrants comment. Respondent contends that his rights were substantially impaired when the Examiner denied his request to exclude from the hearing room during the course of the testimony the witness Tamalis, the FAA Air Carrier Inspector assigned to National Airlines. Respondent urges that Tamalis should have been excluded because he was a witness, and also because the National flight crews who would appear as

[14] Section 301.32(b).

[15] We do, however, wish to make a general observation concerning the nature of the remaining charges in the Administrator's complaint, none of which, as previously indicated, are pertinent to our disposition of this proceeding. Our examination of them indicates that many appear trivial and some are ambiguous as to the date upon which the incident is alleged to have taken place. We fail to see what useful purpose is served in an emergency proceeding such as this by the inclusion of trivial and ill-defined charges, and such action can only serve to clutter the record with evidence directed toward establishing, refuting, or explaining them.

witnesses would be reluctant to testify. The Examiner denied respondent's request upon the representation of the Administrator's counsel that Tamalis' presence was necessary to guide him on certain technical matters that might arise, and respondent has made no showing that he was, in fact, in any way prejudiced by this action. Under the circumstances we find no prejudicial error in the Examiner's ruling.

7. **Sanction**

Having found that the Administrator has established the major charges contained in his complaint, we turn now to the question of sanction. The Administrator, whose stake is large in the promotion of air safety, has determined that revocation of respondent's airman certificate is required because his conduct demonstrates that he cannot be trusted as a pilot in any capacity. On the basis of the record, the Examiner has reached the same conclusion, finding that the respondent demonstrably does not possess the attributes required of a pilot-in-command and lacks the qualifications and fitness required of the holder of an airline transport pilot rating and certificate. Accordingly, he would affirm the Administrator's emergency order of revocation. Respondent's position is that, assuming the existence of violations which we have found, at most action would be warranted only against his airline transport pilot rating.

After careful consideration of all pertinent factors, we agree with the sanction imposed by the Examiner and we find that this sanction is required by safety in air commerce or air transportation and the public interest. It would be difficult to conceive of a more flagrant disre-

gard of applicable safety standards than are exhibited by this record. Thus the evidence shows, and we have found, that respondent has deviated from applicable safety standards by conduct which resulted in careless and reckless operation, failure to maintain the required separation from clouds, and there are incidents of landing when weather conditions were below the prescribed minimums, failing to give the right-of-way, creating a collision hazard, failure to conform to the traffic pattern prescribed for an airport, and deviating from an air traffic clearance. Each of these violations involves a most serious infraction of the Civil Air Regulations; taken together they constitute a gross affront to air safety and the public interest which the Board cannot permit or condone.

We are not unmindful of the fact that respondent has never failed a line check or a six-months' proficiency check. Technical proficiency in manipulating the controls of aircraft on certain occasions when respondent was subject to observation does not establish that respondent possesses the required degree of care, judgment, and responsibility, for technical proficiency is not alone the measure of the qualifications essential for an airline pilot.[36] On the other hand, a record of such serious and unjustified violations of the Civil Air Regulations in the last three years — none of which involved a lack of proficiency in manipulating the controls — is more than enough, in our view, to establish that respondent does not possess the required degree of judgment.

We have also given consideration to limiting the

[36] *Administrator v. Specht*, *supra*, Order S-825, pp. 5-9; 254 F. 2d, pp. 915-917. As the Board said on p. 8 of its opinion, "The pilot who can control his plane but cannot control himself is not a safe pilot."

sanction to the loss of respondent's Airline Transport Pilot Rating, and permitting him to retain his certificate. Thus, in the **Specht** case, the Board revoked Specht's pilot-in-command privileges only, since as a co-pilot Specht would be under the supervision of other pilots-in-command. However, we do not believe that such a sanction would afford the public sufficient protection in the case of respondent. While Specht acted in anger on a single instance, respondent has deliberately piloted in disregard of the air safety rules on a number of occasions, demonstrating a pattern of conduct which renders him completely untrustworthy.[37] In this connection, as pointed out by the Administrator, under the Civil Air Regulations the holder of a commercial pilot certificate can operate as second in command of large aircraft in scheduled and irregular air carrier operations, and as a pilot-in-command of small aircraft utilized in irregular air carrier operations. The Administrator also points out that were the respondent permitted to hold a private pilot certificate, he could operate as pilot-in-command of aircraft not engaged in air carrier or commercial operations and could also carry passengers so long as the flight was not conducted for compensation or hire. It is clear therefore that, although the technical proficiency required in these other pilot categories may vary, respondent nonetheless

[37] In a comparable situation, respondent acted even more dangerously than Specht. The TWA pilot, in anger over not receiving an altitude to which he regarded himself entitled, declared an emergency which he knew did not exist and climbed through space known by him to be occupied by another airliner. Air traffic control was thereby cognizant of Specht's action. Respondent, however, made such a change in altitude without the knowledge of air traffic control. Thus, on the April 25, 1960, flight from Miami to New York, respondent had obtained an IFR clearance to maintain 9,000 feet. Although no emergency existed, he later desired to climb to 17,500 feet, but was unable to secure an amended clearance because of communication difficulties. Respondent, nevertheless, climbed to his desired altitude, although he knew that an Eastern Air Lines flight was operating two minutes behind him at 11,000 feet.

would be expected to possess and exercise a very high degree of care, judgment, and responsibility, characteristics which the record establishes are lacking in the respondent. In view of respondent's flagrant disregard of or indifference to the rules of air safety, his demonstrated lack of the required qualities of care, judgment, and responsibility, and all other factors heretofore discussed, we can only conclude that respondent's Airman's Certificate and all ratings and privileges held by him should be revoked.

We have considered the remaining contentions advanced by the respondent in support of his appeal and find that they are without substantial merit.

ACCORDINGLY, IT IS ORDERED:

1. That, except to the extent indicated herein, respondent's appeal from the Examiner's Initial Decision be, and it hereby is, denied.

2. That the Administrator's Order of Emergency Revocation, dated January 12, 1961, revoking respondent's Airman Certificate No. 143266 be, and it hereby is, affirmed.

Boyd, Chairman, Gurney, Minetti and Gillilland, Members of the Board, concurred in the above opinion and order. Murphy, Vice Chairman, did not take part in the decision.

s/ Robert C. Lester
Robert C. Lester
Secretary

(SEAL)

CERTIFICATE OF COUNSEL

I hereby certify that a true copy of the foregoing Petition for Writ of Certiorari was served by air mail this day of January, 1963, upon:

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